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No. 81-5321

In The
Supreme Court of the United States

October Term, 1981

EARL ENMUND, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, CALIFORNIA, GEORGIA, MISSISSIPPI, MISSOURI, NEBRASKA, NEW MEXICO, TENNESSEE, TEXAS, UTAH IN SUPPORT OF RESPONDENT, AMICI CURIAE

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INTEREST OF AMICI CURIAE

The above-listed states, through their respective Attorneys General, respectfully offer this brief as amici curiae in support of the respondent, the State of Florida. The amici curiae, as does Florida, have death penalty statutes permitting the imposition of capital punishment upon a finding of one or more specified aggravating circumstances, and the lack of mitigating circumstances substantial enough to merit leniency. It is inevitable that the precise issue before this Court will arise in the jurisdictions represented by the amici curiae. Therefore, the amici curiae have a profound and continuing interest in the resolution of the issue before the Court.

SUMMARY OF ARGUMENT

The language of this Court's decision in *Coker v. Georgia*, 443 U.S. 584 (1977), indicates unresolved tension between two incompatible theories of punishment: utilitarianism and retributivism, especially as the latter theory finds expression in the principle of proportionality. The utilitarian approach, though superficially humane and relied on in scattered instances by members of the Court, is defective for several reasons: (1) it does not coincide with ordinary perceptions of justice, which include proportionality between the offense committed and the penalty incurred; (2) it is destructive of human dignity by making people mere means to ends; and (3) the Constitution itself, including the Eighth Amendment as interpreted by this Court, is based upon natural law rather than utilitarianism and incorporates the retributivist proportionality principle. Proportionality of punishment therefore is the superior approach, whether viewed morally, logically, or constitutionally.

In applying the proportionality principle, what truly is proportional must be determined by objective rather than subjective criteria. However, the Court's previous mode of analysis, which relies on the three elements of history/precedent, legislative attitudes, and jury decisions, is less than satisfactory. Therefore, two factors should be examined: the nature of the crime and the character of the criminal. Analysis of the nature of felony murder reveals that this Court has already established a "bright line" between cases where the victim has lived and those where he was killed. That same line should apply fully in all situations. Where a person dies in the course of a felony in which the defendant knowingly and willingly participated, the death penalty should always be available. Analysis of the character of the offender and his degree of participation

insures true proportionality by allowing mitigation of the death penalty when appropriate under the circumstances. This Court has already adopted essentially this approach in *Coker v. Georgia* with *Lockett v. Ohio*, 438 U.S. 586 (1978).

ARGUMENT

IN ORDER TO PROPERLY SERVE THE PRINCIPLE OF PROPORTIONALITY, WHICH IS BOTH THE ESSENCE OF CRIMINAL JUSTICE AND THE ONLY DEFENSIBLE EXPRESSION OF THE EIGHTH AMENDMENT PROHIBITION OF EXCESSIVE PENALTIES, THE DEATH PENALTY SHOULD BE AVAILABLE IN FELONY MURDER CASES.

A. *Introduction.* Petitioner Enmund asserts that his sentence of death for a felony murder is "excessive" and therefore unconstitutional. (Pet. Brief at 7.) The primary basis for his claim is the holding of *Coker v. Georgia*, 433 U.S. 584 (1977), and the following language from that case:

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

433 U.S. at 592. Respondent, the State of Florida, takes the contrary view, and this Amici Curiae Brief is submitted in support of Florida's position. It is the view of Amici that the language of *Coker*, supra, demonstrates an unresolved tension within the Court between two theories of punishment. That tension impedes clear analysis of Eighth Amendment issues. One of these approaches is logically and morally better than the other, and provides a sounder sny-

thesis of this Court's prior Eighth Amendment decisions. The better theory fully supports imposition of the death penalty in some felony murder cases, while minimizing the likelihood that it will be imposed unjustly.

B. *Two theories of punishment: utilitarianism v. retributivism.* The language from *Coker* quoted above seeks to join together what are really two incompatible philosophies of punishment. The first alternative, whether a punishment "makes no measurable contribution to acceptable goals of punishment" so as not to needlessly impose suffering, is meaningful only if we know what are the "acceptable goals" of punishment. The meaning of "acceptable goals" apparently is to be found in *Furman v. Georgia*, 408 U.S. 238 (1972), *Robinson v. California*, 370 U.S. 660 (1962), *Trop v. Dulles*, 356 U.S. 86 (1958), and *Weems v. United States*, 217 U.S. 349 (1910), because the language from *Coker* being analyzed immediately follows a statement that this Court had "firmly embraced the holdings and dicta" of those cases that the Eighth Amendment bars "excessive" as well as "barbaric" punishments. Justice Brennan's concurring opinion in *Trop v. Dulles* includes a straight-forward declaration about what are the acceptable goals of punishment:

> In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to *rehabilitate* the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is *but one* of the several purposes of the penal law. Among other purposes are deterrence of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution.

356 U.S. at 111. This statement is essentially "utilitarian" in its approach.

> The utilitarian theory of punishment can be summarized in three propositions . . . According to this theory:
>
> 1. Social utility (correction, prevention, deterrence, etcetera) is a necessary condition for justified punishment.
>
> 2. Social utility is a sufficient condition for justified punishment.
>
> 3. The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it.[1]

These utilitarian sentiments find some parallel in others of the quartet of cases on which *Coker* relies. In *Weems v. United States*, supra, the holding that the "cadena temporal" was an unconstitutional punishment for false official record entries was supported by a statement, remarking of a lesser penalty, "The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." 217 U.S. at 381. Justice Marshall's concurring opinion in *Furman v. Georgia* specifically relied on this *Weems* language and Justice Brennan's *Trop v. Dulles* opinion did the same in formulating a list of rational goals for the death penalty, which were then analyzed to determine whether they were sufficiently fulfilled to justify the penalty. See 408 U.S. at 342-359. Justice Marshall unhesitatingly rejected retribution (treated as a synonym for "retaliation" and "vengeance") as an acceptable goal of punishment.

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[1] J. FEINBERG AND H. GROSS, PHILOSOPHY OF LAW 504 (footnotes omitted) (1975) (hereinafter FEINBERG & GROSS).

The utilitarian approach is, however, far from holding complete sway, either in the realm of this Court's opinions[2] or on the broader philosophical battlefield. The opposing viewpoint is generally known as "retributivism," and has been summarized as espousing the following:

1. Moral guilt is a necessary condition for justified punishment.
2. Moral guilt is a sufficient condition ("irrespective of consequences") for justified punishment.
3. The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense.[3]

It is here that we begin to see the tension present in *Coker's* alternative theories of Eighth Amendment excessivity: the utilitarians, like Justice Marshall, reject retribution as an "acceptable goal of punishment," and *Coker's* first alternative is essentially utilitarian, but one of the essential elements of retributivism is its demand for proportionality between the crime and the punishment, and *Coker's* second alternative explicity adopts a principle of proportionality. It is obvious that no consistent decision-making process will be possible so long as the Court is compelled to rely on two principles which are polar opposites.

Before attempting to resolve the conflict, it must be pointed out that retributivism, particularly as presented in the principle of proportionality, cannot be written off as easily as Justice Marshall sought to do in his *Furman* opinion. Indeed, it can be quite reasonably argued that the idea of proportionality, which is inextricably bound up with retributivism, contains the very essence of justice in a criminal law context. Criminal justice seems at the very

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[2] In *Furman*, supra, Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, strongly disagreed with the proposition that retribution is not an acceptable rationale for punishment. 408 U.S. at 394-95. See also Justice Powell's dissent at 452-54.

[3] FEINBERG & GROSS, supra, at Note 1, at 502.

least to mean receiving what punishment one deserves, and not receiving punishment one does not deserve. On the one hand, we intuitively find it unfair for an innocent person to be punished at all. On the other hand, it strikes us as being wrong that the guilty should not be punished, or that they be punished without some reasonable correlation between the offense and the penalty. We revolt at the thought of capital punishment for parking violations, and we find nearly as repugnant the idea of punishing murder with a $5 fine.

Thus, our most basic instincts about criminal justice include a principle of proportionality of punishment. This principle of proportionality has been repeatedly advocated throughout history. A very early example is the Biblical directive found in Exodus 21:23-24:[4]

> But if there is any further injury, then you shall appoint as a penalty life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.

See also Leviticus 24:17-21 and Deuteronomy 19:21. While this "lex talionis" has often been castigated for harshness, the fact is that it was a significant amelioration of the pre-Mosaic pattern of unrestrained personal revenge and blood feud.[5] Moreover, the principle of proportionality cannot be dismissed as being merely the view of religious adherents, because very similar concepts have found expression

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[4] All Bible quotations are from the New American Standard translation (NASB).

[5] H. Daniel-Rops, Daily Life in the Time of Jesus 174 (O'Brian tr., 1962). Compare the clear proportionality of this Mosaic arrangement with the cruel excessiveness displayed in Lamech's boast in Genesis 4:23-24: "For I have killed a man for wounding me; And a boy for striking me; If Cain is avenged sevenfold, Then Lamech seventy-sevenfold."

over thousands of years in the writings of distinguished secular thinkers who arrived at their conclusions from varied philosophical approaches. Examples include Aristotle,[6] Justinian,[7] and Immanuel Kant.[8]

C. *Proportionality is logically, morally, and constitutionally superior to utilitarianism.* Thus, the principle of proportionality derives from a long and respectable philosophical tradition. At the same time, it must be understood that the utilitarian approach to punishment suffers from some very grave defects, which have been succinctly stated as follows (referring to the three theses of utilitarianism quoted previously):

> Thesis 2, ... is the utilitarian's greatest embarrassment. His retributivist opponent argues forcefully against it that in certain easily imaginable circumstances it would justify punishment of the (legally) innocent, a consequence which all would regard as a moral abomination. Some utilitarians deny that punishment of the innocent could ever be the alternative that has the best consequences in social utility, but this reply seems arbitrary and dogmatic. Other utilitarians claim that "punishment of the innocent" is self-contradiction. The concept of punishment, they argue, itself implies hard treatment imposed upon the guilty as a conscious and deliberate response to their guilt. ... H.L.A. Hart calls this move a "definitional

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[6] ARISTOTLE, THE NICHOMACHEAN ETHICS, Book V.

[7] Justice is "the constant and perpetual disposition to render every man his due." *Institutes*, Book 1, Title 1, pr.

[8] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101-02 (Ladd Trans., 1965) (hereinafter "KANT"): "What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the Law of retribution (jus talionis) can determine exactly the kind and degree of punishment ....

> stop, " and charges that it is an "abuse of definition," and indeed it is, if put forward by a proponent of the general utilitarian theory. If the right act in all contexts is the one which is likely to have the best consequences, then conceivably the act of framing an innocent man could sometimes be right; and the question of whether such mistreatment of the innocent party could properly be called "punishment" is a mere question of words having no bearing on the utilitarian's embarrassment. . . .
>
> No kind of utilitarian, however, will have plausible recourse to the definitional stop in defending thesis 3 from the retributivist charge that it would, in certain easily imaginable circumstances, justify excessive and/or insufficient penalties. . . . And yet, if these were the penalties likely to have the best effects generally, the utilitarian in the theory of punishment would be committed to their support.[9]

Consideration of these general faults in the theory demonstrates that the "acceptable goals" of punishment of a utilitarian are not nearly so acceptable as they may first appear. For example, various members of this Court have written with great force and eloquence about how the Eighth Amendment protects the fundamental dignity of all men, even criminals. See Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. at 100, Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. at 270-80, and Justice Marshall's dissent in *Gregg v. Georgia*, 428 U.S. 153, 240 (1976). What greater loss of dignity, what clearer instance of making convicted defendants "objects to be toyed with and discarded"[10] can there be than to say with the utilitarian, "We can do with you whatever we will, regardless of your individual moral desert, for the greater good of society"? Yet this is precisely what happens when we look at general deterrence as a primary reason for punishment.

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[9] FEINBERG & GROSS, (supra at Note 1), at 504-05.

[10] *Furman v. Georgia*, 408 U.S. at 273 (Brennan, J., concurring).

> Retributive punishment actually puts human dignity on a high level. The theory which teaches that punishment merely is expedient and useful, degrades human nature. When justice is at the basis of penalty, man is treated in dignity, as a person. However, if the public good is the basis, he is treated as a means to an end. Man has free choice and responsibility, and punishment based on this assumption honors man for what he really is. Responsibility is at the basis of all punishment, and any failure to recognize this degrades human personality.[11]

Another example may be found when we speak of rehabilitation as our primary objective. While this sounds more benign because more individually oriented, it, too, is flawed. H.L.A. Hart has cogently argued that, to make rehabilitation ("reform" in Hart's terminology) the object of punishment, is actually to distort the fundamental purposes of the criminal law:

> There is indeed a paradox in asserting that Reform should 'predominate' in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer, not to prevent murder .... The objection to assigning to Reform this place in punishment is not merely that punishment entails suffering and Reform does not; but that Reform is

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[11] W. Baker, Worthy of Death 94 (1973). *See also* Kant, supra note 8, at 100: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things. His innate personality (that is, his right as a person) protects him against such treatment, even though he may indeed be condemned to lose his civil personality. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it. . . ."

> essentially a remedial step for which *ex hypothesi* there is an opportunity only at the point where the criminal law has failed in its primary task of securing society from the evil which breach of the law involves.[12]

Moreover, as Herbert Morris has demonstrated in convincing detail, "The logic of sickness [which underlies a rehabilitative ideal] implies the logic of therapy," the end result of which is to deprive criminals of the inalienable human dignity that gives them a right to be punished rather than "treated."[13]

Therefore, before we even turn to the Constitution, logic and morality teach us that retributivism, expressed in the principle of proportionality, is superior to utilitarianism as a rationale for punishment. The Constitution supports the same conclusion. Those supporting retributivism have generally been classed as belonging to the "natural law" philosophical tradition.[14] The Constitution itself is a product of the natural law philosophy.

> [W]hatever the historical obscurities which surround the proposal and adoption of the Bill of Rights, there is little question that the Bill was part of and gives expression to a developing moral theory regarding the moral rights of human beings which had been theoretically stated by Milton and Locke and which was being given or was to be given expression by Rousseau and

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[12] H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, reprinted in PUNISHMENT AND RESPONSIBILITY – ESSAYS IN THE PHILOSOPHY OF LAW 26-27 (1968).

[13] Morris, *Persons and Punishment*, THE MONIST 52:4 (Oct. 1968), reprinted in FEINBERG & GROSS, supra, at 572-85.

[14] *Cf.* D.A.J. RICHARDS, THE MORAL CRITICISM OF LAW 8-10, 230-31 (1977) (hereinafter RICHARDS).

> Kant. The founding fathers believe some such theory. . . . The choice to adopt or reject such a theory is not an open question in the United States; it is part of the warp and woof of the constitutional design.[15]

> This being so, it is not surprising that the Constitution contains provisions that accord with a retributivist theory of punishment, but which do not jibe with utilitarianism. One clear example appears in the prohibition on bills of attainder.[16]

It is therefore altogether proper that the principle of proportionality has always played a predominant role in this Court's analysis of Eighth Amendment questions. The first detailed examination of the prohibition of cruel and unusual punishments is *Weems v. United States*, supra. There the majority opinion, authored by Justice McKenna, framed the issued by describing the penalty of "cadena temporal" for a false entry in the public record and then asking,

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, *and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.*

Is this also a precept of the fundamental law?

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[15] *Id.* at 44-45 (footnotes omitted); cf. Barker, *Natural Law and English Positivism*, from TRADITIONS OF CIVILITY (1948), reprinted in FEINBERG & GROSS, supra, at 14-15.

[16] RICHARDS, supra, (at Note 14), at 232-33. The manner in which attainder affected innocent persons is indicated in *Furman v. Georgia*, 408 U.S. 317, Fn.8 (Justice Marshall concurring). See also Deuteronomy 24:16, "Fathers shall not be put to death for their sons, nor shall sons be put to death for their fathers; everyone shall be put to death for his own sin."

217 U.S. 366-67 (emphasis added). The Court's answer was yes, the punishment was so disproportionate to the crime that it offended the Eighth Amendment. The holding of the case was that the principle of proportionality is the standard by which the Eighth Amendment measures excessiveness of penalties. That cannot be doubted, particularly after reading Justice White's dissent, the whole focus of which is on precisely that point. (See 217 U.S. at 382-413.) *See also, Rummel v. Estelle*, 445 U.S. 263, 272-74, 289-90 (1980).

The principle of proportionality seems also to have compelled the decision in *Robinson v. California*, 370 U.S. 660 (1962), where the defendant was in effect punished for being a drug addict. Here was disproportion at its greatest — punishment for what properly considered was no crime at all. "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.[11] Indeed, four members of the Court have explicitly characterized *Robinson* as an expression of the proportionality principle. See Chief Justice Burger's dissent in *Furman v. Georgia*, 408 U.S. at 393 n.18. Further, Chief Justice Warren stated in *Trop v. Dulles* that "Fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime* ...." 356 U.S. at 100 (emphasis added).

It appears that the principle of proportionality has (rightfully) also begun to predominate over utilitarianism in the current Court's analysis of Eighth Amendment questions. This is suggested particularly by Footnote 4 to the majority opinion in *Coker v. Georgia*, where it is flatly

[11] See also Justice Douglas' concurring opinion where he specifically relies on the fact that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" 370 U.S. at 676.

stated that "Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment* and therefore is not invalid for its failure to do so." 433 U.S. at 592-93 (emphasis added).[13] Moreover, every sitting Justice (except Justice O'Connor, who has not yet had occasion to express herself on an excessiveness question) has given substantial assent to the principle of proportionality, though disagreements have arisen about what the proper proportion was in particular cases. *See Coker v. Georgia*, 433 U.S. at 584 (opinion of White, J., joined by Stewart, Blackmun, Stevens, JJ.; opinion of Powell, J.); *Furman v. Georgia*, 408 U.S. at 279-80 (Brennan, J., concurring), 408 U.S. at 331-32 (Marshall, J., concurring), and 408 U.S. at 393 (Burger, C.J., dissenting, joined by Blackmun, Powell and Rehnquist, JJ.); *Rummel v. Estelle*, 445 U.S. at 271-74, n.11 (opinion of Rehnquist, J., joined in by Stewart, White, Blackmun, JJ., and by Burger, C.J.). Therefore, application of a principle of proportionality accords with the better part of this Court's prior practice, as well as with what is expressed by the Constitution itself, and is the logically and morally superior approach.

D. *The proportionality and constitutional validity of particular penalties should be determined by analysis of the nature of the crime and the character of the offender.* This Court has rightfully sought in past Eighth Amendment cases to base its determinations on objective factors rather than the subjective views of its members. Unfortunately, this has resulted in an almost mechanical mode of analysis based on the three elements of history and precedent, legislative attitudes, and the sentencing decisions of juries. *See, e.g., Gregg v. Georgia* and *Coker v. Georgia*,

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[13] Even Justices Brennan and Marshall have acknowledged that even useful or "necessary" punishments can be unconstitutional because of severity. See *Furman v. Georgia*, 408 U.S. at 281 n.26 (Brennan, J., concurring); 408 U.S. at 355-56 (Marshall, J., concurring).

supra. While this method does have some value, it suffers from two major defects. The first problem is the danger of cutting the principle of proportionality adrift from its philosophical underpinnings. The essence of the natural law tradition on which the principle of proportionality is based is that "positive law" — human statutes and legal decisions — is valid only insofar as it reflects higher, immutable concepts of justice. Thus, Nazi enactments were certainly "law" in the sense of being enforceable rules of conduct, and may even have in some instances reflected a concensus of the population, but because of their gross immorality, we deny them validity. While a coalescence of history and precedent, legislative action, and jury actions presumably tends, by the breadth of the sources drawn upon, to illuminate the substance of immutable justice in a particular situation, it does not *necessarily* do so, and hence cannot be given absolutely determinative weight.

Secondly, it cannot be ignored that this Court's own decision-making has substantially altered what other courts, legislatures, and juries are able to do (or at least, perceive themselves as being able to do). For example, although before *Furman v. Georgia* the decision whether death should be imposed was left to the untrammeled discretion of juries, it is now necessarily channeled in certain ways, and in a significant number of states is not done by the jury at all, but by the judge. The value of jury decisions as an indicator of what immutable justice is, as distinguished from what the latest pronouncement of this Court is, has therefore been materially altered. These changes have also been extremely rapid; as several members of the Court have themselves pointed out, new decisions about the death penalty have come in such quick succession that the legislative processes have not really had opportunity to function and to provide accurate material for analysis. *Coker v. Georgia*,

433 U.S. at 613-19 (Burger, C.J., dissenting, joined by Rehnquist, J.); cf. *Roberts v. Louisiana*, 428 U.S. 325, 362 (1976) (White, J., dissenting).

This is not to say, however, that the Court is left without any method for determining questions of proportionality. First, the essence of proportionality is a correlation between the *offense* and the punishment. In the context of the present case, this Court has already drawn a logical "bright line," both implicitly and explicitly, that can be stated briefly—"Death is different." The uniqueness of death as a penalty for crime has been repeatedly noted by this Court, in *Furman* and subsequent cases. Implicit in those comments, however, is the recognition that death is unique for *everyone*, criminal and victim alike. Once it occurs, there is no turning back. Just as this Court has accorded special concern to defendants subject to the death penalty, likewise a special opprobrium and penalty logically should apply to cases where a death, the victim's, has already occurred. This implicit logic was made explicit in *Coker v. Georgia:*

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S., at 187, is an excessive penalty for the rapist who, as such, does not take human life.

433 U.S. at 598. Where death has been inflicted within the context of the felony-murder situation, proportionality demands that death be available as punishment.[19]

Two objections will immediately be raised: first, that this is a retreat to the rule of lex talionis, which (even if an improvement over prior practice) is generally viewed as being mechanical and therefore susceptible to being unduly severe; second, that if such a principle is firmly installed in Eighth Amendment jurisprudence, it will prove unworkable, because there are too many crimes for which sanctions of a "similar" character simply could not be imposed. Both objections can be answered in the same response: accepting the principle of *proportionality* does not require adopting a doctrine of precise *equivalency*. Proportionality is roughly served so long as death for death is *possible*, but is most truly served when the character of the *offender* as well as the *offense* is given consideration; indeed, it hardly makes sense to talk about making punishment proportional to personal desert unless the character of the offender is weighed. *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Once we are removed from the acceptedly unique situation of a crime involving a death, we may legitimately leave it to the body responsible for policy decisions, the legislature, to determine what constitutes true proportionality for each type of crime that is committed.

Both of these positions are in accord with decisions already made by this Court. That the death penalty is constitutionally permissible in felony-murder cases, so long as any matters related to either the crime itself or to the character and participation of the defendant are admitted to be considered as mitigation, is implicit in the various

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[19] KANT, supra at Note 8, at 102: "There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the [murderer] is judicially condemned and put to death."

opinions in *Lockett v. Ohio*, 438 U.S. 586 (1978). Justice White argued that death was a disproportionately severe punishment "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. In doing so he stood alone. A six member majority of the Court refused to hold that execution could never be imposed for felony murder. Justice Rehnquist flatly rejected the results of Justice White's proportionality analysis. 438 U.S. at 635-36. The plurality opinion, authored by Chief Justice Burger and joined in by Justices Stewart, Powell, and Stevens, emphasized that the felony-murder doctrine itself was constitutionally inoffensive:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.

438 U.S. at 602. They did hold that degree of participation in the crime had to be *considered* in assessing punishment, but nowhere in the opinion is there any suggestion that death may not be appropriate, even for a felony-murder, if the mitigating effect of minimal participation or lack of specific murderous intent is out-weighed by sufficiently cogent aggravating factors.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis original, footnotes omitted).

> [A] statute that prevents the sentencer in all capital cases from giving independent *mitigating* weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation

> creates the risk that the death penalty will be imposed in spite of factors which *may call* for a less severe penalty.

438 U.S. at 605 (emphasis added). Justice Blackmun likewise rejected any absolute prohibition on the use of the death penalty based upon proportionality analysis. 431 U.S. at 613-14. Instead, he too would have the circumstances of the crime weighed in mitigation, the outcome to be determined by the cumulative impact of all the factors, both mitigating and aggravating, relevant to sentencing:

> The more manageable alternative, in my view, is to follow a proceduralist track, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force.

438 U.S. at 615-16. It therefore appears that, while degree of participation and other circumstances of the crime must be taken into account as mitigating factors, the existence of such factors does not dictate that capital punishment may never be imposed. Such circumstances must simply be added to the sentencing calculus, the outcome being determined by the impact of all sanction-relevant variables. Consequently, the Court appears to have drawn a sharp distinction between the "bright line" of *Coker*, where no death

has occurred, and the "factual line" of *Lockett*, where criminal activity has caused a death, but the sentencer may still take into account all possible mitigating factors.

The second proposition, that outside of the line between death and non-death situations the line-drawing properly rests with the legislatures, is the specific holding of *Rummel v. Estelle*, 445 U.S. at 274-75, 283-84.

Retributivism, given substance in the principle of proportionality, is the only philosophy of punishment that succeeds in being consistent with logic, morality, and the terms of the Constitution, as well as providing a reasonable synthesis of this Court's previous Eighth Amendment decisions. That approach satisfies all reasonable demands because it both allows for a unique sanction proportionate to the unique offense, death for death, if that is appropriate, and also provides for the mitigation of that sanction if justified by circumstances. To say that death may *never* be imposed in felony murder situations destroys proportionality as much as saying it must *always* be applied. The "availability cum opportunity to mitigate" scheme is the only one truly consistent with the Constitution.

E. *The peculiarities of some felony murder situations do not require that the death penalty be rendered unavailable in all felony murder situations.* Several considerations have been raised in Petitioner's Brief that he claims require that the death penalty be found unconstitutional in felony murder cases. The first such claim is that, because he did not personally kill the victims or intend their deaths, he is really no different from any ordinary robber, or a rapist like Coker, so that death would be a disproportionately heavy sentence. However, the felony-murderer *is* different from Coker and other "ordinary" felons in one obvious way — somebody *died* as a result of criminal activity in which he was a participant. Petitioner evidently would have us ignore resultant harm and assess criminal liability on the basis of intent alone, but this proves too much. If intent alone establishes culpability, we not only must cease imposing

lighter punishments for attempts than for consummated crimes, we must begin punishing mere wicked thoughts. This Court has, in the past, treated resultant harm as a legitimate consideration in the Eighth Amendment cases. For example, in *Weems v. United States*, the Court compared Weems' offense to a Federal embezzlement statute and concluded,

> In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual.

217 U.S. at 381. If a relative lack of resultant harm can render a punitive statute disproportionately severe and unconstitutional, by the same token a greater harm done implies the propriety of greater punishment. This thought is present in *Coker v. Georgia* itself: rape is bad, but not as harmful as murder, so it should be punished less. The result for the murder victim is equally bad whether he is intentionally killed or "felony murdered" — he is dead, and his death is the result of criminal activity. To say that degree of harm should not be considered is to make victims, who have done nothing, "objects to be toyed with and discarded". Victims, too, have a right to human dignity, to preservation from arbitrary, socially unacceptable, and often torturous deaths; "our concern for human life must not be confined to the guilty". *Coker v. Georgia*, 433 U.S. at 616 (Burger, C.J., dissenting).

Another point that needs to be made is that this Court need not accept at face value the statements that Petitioner "did not cause death," and "did not intend death to occur." Causation is an extremely complex concept; Hart and Honore spend well over 400 pages exploring its

ramifications.[20] The thing that must be understood is that physical causation (e.g., who pulled the trigger) does not exhaust legal causation; the law makes persons responsible for many things they do not directly and physically cause to happen. Therefore, for Petitioner to say that he did not "cause" the deaths of the Kerseys because he (arguendo) was not the triggerman, is really to beg the question. The proper inquiry is whether the law holds Petitioner responsible and liable for what involvement he did have in the crime, and the answer plainly is yes. As previously noted, *Lockett v. Ohio* found felony-murder doctrine constitutionally permissible. This Court has also addressed "vicarious" liability at length in the context of holding conspirators responsible for the substantive crimes of their coconspirators, and found nothing wrong with it:

> We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyper v. United States*, 225 U.S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *Id.*, p.369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v. Kissel* 218 U.S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States*, 163 U.S. 632, 657-658. . . . The govern-

[20] H.L.A. HART and A.M. HONORE, CAUSATION IN THE LAW (1959).

ing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson v. United States*, 62 F.2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. . . .

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.

Pinkerton v. United States, 328 U.S. at 646-48 (1946).

This brings us to the question of intent. Petitioner would have this Court require active premeditation before the death penalty could be imposed, but this particular "bright line" is far too restrictive. While mental states are typically labelled as falling within one of four distinct catagories — purposely doing an act, knowingly doing it, recklessly doing it, or negligently doing it — it is obvious that these are nothing more than handy benchmarks on an infinitely graded continuum, which at their edges merge into one another like colors in the spectrum. What moral distinction is there to be drawn between one who specifically purposes the death of another in the course of a robbery, one who knows that the robbery will result in the death of another without purposing it, and one who willingly participates in an armed robbery which creates a grave foreseeable risk of death? In each instance a death occurs as the result of

criminal action in which the defendant participated, and would not have occurred if the crime had not been committed. Anyone who knowingly creates a substantial risk of death to another is in effect saying, "I don't know for certain that anyone will be killed if this crime I plan to participate in is carried out, but I am willing that someone should die." If he were not willing, he would avoid it by not participating. Again, the victim is just as dead whether his death was purposed or resulted from an avoidable and illegitimate risk, the commission of a potentially violent crime.

> There is a sense in which life is always endangered by sexual attack, just as there is a sense in which it is always endangered by robbery, or by burglary of a dwelling, or by any physical assault. The threat of violence is not the less a threat for being conditional, and violence always carries the possibility of a fatal outcome.[21]

It is therefore just as proper to say that one who "felony murdered" through risk creation was at fault for the death, as it is to say that one who premeditatedly murdered was at fault for the death, and they should be treated similarly. The death penalty should be available,[22] but the decision whether death should actually be imposed left to the fully informed, properly channeled discretion of the sentencing authority, giving due consideration to the defendant's degree of involvement and intent. Any other resolution defies the Constitution as previously interpreted, as well as general principles of logic and morality.

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[21] Parker, *Making the Punishment Fit the Crime*, 77 HARV.L.REV. 1071, 1077 (1964).

[22] See Exodus 21:28-29: "And if an ox gores a man or a woman to death, the ox shall surely be stoned and its flesh shall not be eaten; but the owner of the ox shall go unpunished.

If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death."

Respectfully submitted,

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